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No. 75-1683

In the Supreme Court of the United States

OCTOBER TERM, 1976

YELLOW FREIGHT SYSTEM, INC., PETITIONER

v.

SECRETARY OF LABOR
AND
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the judgment of the court of appeals summarily affirming the finding of the Occupational Safety and Health Review Commission that petitioner violated a safety regulation[1] issued by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 *et seq.*). The Commission's order directed that the violation be abated, but that no civil penalty be assessed.

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[1]The regulation, 29 C.F.R. 1910.132(a), in relevant part, requires that personal protective equipment for extremities be provided and used in circumstances where there are hazards capable of causing injuries of function. See n. 3, *infra*.

1. Petitioner is a large interstate motor carrier which operates 151 freight terminals. At its Tulsa, Oklahoma, facility it employs 23 dock workers who regularly are engaged in loading and unloading trucks. (Pet. App. 3, 12; J.A. 24-25, 93-94.)[2] Pursuant to an employee complaint alleging "dangerous material on platform, no personal protection for handling dangerous freight, [and] converter dollies too heavy for one man to handle" (J.A. 23), an OSHA compliance officer of the Department of Labor inspected the Tulsa facility (Pet. App. 8; J.A. 21-23, 27-28). The inspector noted numerous persons engaged in continuous material handling on petitioner's freight dock, wheeled vehicles used to transport and stack freight, and the fact that freight handlers were neither using nor required by petitioner to use protection against possible foot injuries from these conditions (Pet. App. 3-4, 12; J.A. 24-25). It was undisputed that these workers routinely handled freight weighing up to 6,000 pounds, including heavy cartons, metal drums, and miscellaneous steel; that items weighing 30 to 50 pounds were regularly carried by hand and stacked to heights over 7 feet; that bottoms often fall out of manually-carried items and such items frequently fall to the dock or are dropped by employees; and that it was possible for freight of all types to fall on workers' feet (Pet. App. 3-4, 12-13; J.A. 36-40, 44, 48-49, 52-56, 61-63, 68-72, 116-119). It was also undisputed that while petitioner's records showed a low incidence of reported foot injuries from these conditions, not only had such injuries occurred and been reported, but also other incidents had occurred which presented possibilities of similar injuries (Pet. App. 4, 10-11; J.A. 40-41, 55-56, 59, 62, 64-65).

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[2]"Pet. App." refers to the Appendix to the Petition. "J.A." refers to the Joint Appendix filed in the court of appeals.

The compliance officer concluded that a hazard requiring protective safety shoes was present on petitioner's Tulsa dock, and the Secretary thereafter cited petitioner for violating 29 U.S.C. 654(a)(2) by failing to require use of such footwear by Tulsa employees "having exposure to foot injury" (Pet. App. 3; J.A. 2, 5, 23-25).[3] The Secretary also ordered petitioner to abate this hazard within 20 days, but did not propose any civil penalty for the violation (Pet. App. 10; J.A. 2, 6, 26).

Petitioner contested the citation, and the case was heard by a Commission Administrative Law Judge. The administrative law judge vacated the citation on the ground the Secretary had failed to produce "substantial evidence that [the requisite] hazard exists in [petitioner's] workplace," because of the low incidence of reported foot injuries (Pet. App. 10-13).

The Commission granted review and reinstated the Secretary's citation. It found, on undisputed evidence, that "freight falls frequently from stacks located in the truck and on the dock," that "employees on numerous occasions have had their toes run over by forklifts," and that these conditions were factually indistinguishable

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[3]29 U.S.C. 654(a)(2) requires employers affecting interstate commerce to "comply with occupational safety and health standards promulgated under this [Act]." See also 29 U.S.C. 652(5). 29 C.F.R. 1910.132(a), the relevant safety standard, provides that "[p]rotective equipment, including personal protective equipment for * * * extremities, * * * shall be provided [and] used * * * wherever it is necessary by reason of hazards * * * encountered in a manner capable of causing injury or impairment in the function of any part of the body through * * * physical contact." 29 C.F.R. 1910.136 specifically refers to "safety-toe footwear" as one type of such equipment and incorporates by reference a national consensus standard which was drafted by affected industries and specifies in detail appropriate equipment for providing occupational foot protection. See 29 U.S.C. 652(9).

from those previously found to constitute a "crushing * * * and impact" hazard to feet in *Ryder Truck Lines* v. *Brennan*, 497 F. 2d 230 (C.A. 5) (Pet. App. 4). The court of appeals affirmed without opinion (Pet. App. 1-2).

2. Petitioner principally asserts (Pet. 9-13) that the relevant regulation, 29 C.F.R. 1910.132(a), is impermissibly vague because lower courts have arrived at differing interpretations of its applicability. There is no conflict. On the contrary, the courts of appeals have uniformly held that this remedial civil requirement incorporates "an external and objective test" of "whether or not a reasonable person would recognize a hazard of foot injuries to dockmen" warranting the use of safety-toe footwear and have applied this test consistently in affirming findings of violations in situations factually indistinguishable from this case. *Ryder Truck Lines* v. *Brennan*, *supra*, 497 F. 2d at 233; *McLean Trucking Co.* v. *Occupational Safety and Health Review Commission*, 503 F. 2d 8, 11 (C.A. 4); *Arkansas-Best Freight Systems* v. *Occupational Safety and Health Review Commission*, 529 F. 2d 649, 654-655 (C.A. 8). The regulation in effect adapts the standard of reasonableness, found also in tort law, to the identification and prevention of industrial hazards. Given the wide range of such hazards, such a standard is necessary, and constitutionally valid. The "limitations in the English language with respect to being both specific and manageably brief" require resort to general terms "that the ordinary person exercising ordinary common sense can understand and comply with, without sacrifice to the public interest." *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 578-579. The risk of foot injury during freight dock operations is obviously within the general class of safety hazards this prophylactic regulation is intended to prevent. In these circumstances, the general provision " 'will not be

struck down as vague even though marginal cases could be put where doubts might arise.' *United States* v. *Harriss*, 347 U.S. 612, 618" (*id.* at 579).

Petitioner additionally claims (Pet. 15-18) the Commission improperly created an industry-wide protective-equipment standard through adjudication rather than use of its rulemaking powers. The short answer is that the Commission possesses no substantive rulemaking powers, all of which are vested in the Secretary. 29 U.S.C. 651(3), 655, 657(g)(2). In any event, neither the Secretary nor the Commission created such a rule. The Commission merely held that on the facts proven here the Secretary had established a triggering "hazard" requiring protective footwear. See discussion, *supra*, pp. 3-4. That holding does not preclude factual defenses by other truckers based on their particular operations, nor does it create a "new safety standard for a whole industry" (Pet. 16-17) without regard to the presence of a hazard. In any event, the Secretary need not impose a specific rule for each subclass of cases, particularly when faced with widely varying operations and industrial hazards. See *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 294; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201-203; cf. *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759.

3. Petitioner asserts (Pet. 7) that its Sixth Amendment right to a criminal jury trial was infringed by 29 U.S.C. 666 (e) through (g), which authorize criminal prosecution of three narrowly-defined offenses in the United States district courts. Petitioner lacks standing to raise this assertion, since it was not prosecuted under these provisions but cited under the Act's civil administrative enforcement scheme. See, *e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727; *Association of*

Data Processing Organizations v. *Camp*, 397 U.S. 150, 152. Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 371-372.[4]

4. Petitioner also asserts (Pet. 8-9) infringement of its Seventh Amendment civil "right of trial by jury where the amount in controversy exceeds twenty dollars." Petitioner neither asserted this Seventh Amendment claim before the Commission or court of appeals nor requested a jury trial on this ground. Thus, even if petitioner were entitled to a civil jury trial, that right was waived below and is independently barred from being asserted for the first time now. 29 U.S.C. 660(a), 661(f); cf. Fed. R. Civ. P. 38(b) and (d). Moreover, there is no such right here. The Secretary proposed no penalty for this citation, and the Commission assessed none (Pet. App. 5, 10; J.A. 6).[5] The "amount in controversy" alleged by petitioner (Pet. 8) simply is the unsubstantiated

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[4]Petitioner contended below that the Act's administratively-imposed civil penalties were "criminal in nature" and for that reason its Sixth Amendment rights were infringed (J.A. 7; Ct. App. Br. 49). The courts of appeals have rejected the latter contention. *Brennan* v. *Winters Battery Mfg. Co.*, 531 F. 2d 317 (C.A. 6), certiorari denied, No. 75-1162 (May 24, 1976); *Clarkson Const'n Co.* v. *Occupational Safety and Health Review Commission*, 531 F. 2d 451 (C.A. 10); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 518 F. 2d 990 (C.A. 5), certiorari denied as to this issue, No. 75-746 (March 22, 1976); *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F. 2d 1200, 1204-1205, 1208 (C.A. 3), affirmed *en banc*, 519 F. 2d 1215, certiorari denied as to this issue, No. 75-748 (March 22, 1976); *Beall Const'n Co.* v. *Occupational Safety and Health Review Commission*, 507 F. 2d 1041 (C.A. 8). Cf. *Underhill Const'n Corp.* v. *Secretary of Labor*, 526 F. 2d 53, 57, n. 10 (C.A. 2); *Sheehan Co.* v. *Occupational Safety and Health Review Commission*, 520 F. 2d 1036 (C.A. 5), certiorari denied, No. 75-747 (March 22, 1976).

[5]Accordingly, there is no reason for the Court to hold this case pending its decision in *Atlas Roofing Company*, No. 75-746 *supra*, and *Irey*, No. 75-748, *supra* (certiorari granted in both, March 22, 1976), in which petitioners assert that they were entitled to a Seventh Amendment jury trial on the substantial monetary penalties assessed against them by the Commission.

cost of compliance with an administrative order which assesses no civil penalty—a cost plainly outside the Amendment's ambit. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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